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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Appellant,
vs.
THE UNITED STATES OF AMERICA,
Appellee.

No. 108.

APPEAL FROM UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLANT.

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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant, vs. THE UNITED STATES OF AMERICA, Appellee.	N. 108.

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STATEMENT OF THE CASE.

This is a bill of complaint of the United States of America, by J. W. Ady, United States Attorney for the District of Kansas, against the defendant, under and by virtue of, as it is alleged, the Act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887 (24 St. at Large, p. 379, Vol. 1, Supp. Rev. Stat., p. 529), and the amendatory acts of March 2, 1889 and February 10, 1891 (25 St. at Large, p. 855; Vol. 1, Supp. Rev. Stat., p. 684; 26 St. at Large, p. 743, Vol. 1, Supp. Rev. Stat., p. 891).

It is alleged that:

"This suit is brought by the authority of and under the direction of the Attorney General of the United States, which said authority and direction is

given under and in pursuance of the request of the Interstate Commerce Commission of the United States that the United States Attorney for the District of Kansas be directed and authorized to institute and prosecute all necessary proceedings, legal or equitable, for the enforcement of the provisions of the Interstate Commerce Law against the defendant in relation to the matters herein complained of."

Rec., p. 55.

This allegation in the bill is material to be noticed because counsel in argument shift or enlarge their ground and claim that "*Equity is equal to every emergency*," and that the United States has a right to file such a bill as a general trustee (*parens patriæ*) for all the people independent of any request or action on the part of the Commission, and notwithstanding the provisions and purpose of the Act which are inconsistent with the existence of any such right on the part of the United States in a suit of such a character as the present suit.

This bill is filed for a violation of Section 3 of the Interstate Commerce Act on the ground that the defendant in its rates gives an undue preference or advantage to the City of Omaha, Nebraska, to the undue prejudice or disadvantage of the City of Wichita, Kansas. If this suit were entitled according to substance it would be *City of Wichita vs. City of Omaha.*

This is an independent bill in equity brought in the name of the United States in respect of such alleged discrimination without the matter of such discrimination having been examined and the facts found by the Interstate Commerce Commission; and the main question in the case is whether an original bill in equity will lie in the

first instance by and in the name of the United States where the Interstate Commerce Commission has not investigated or made any findings, and where the sole purpose of the bill is to establish the existence of alleged discriminatory railroad rates as between "*localities*," and to have such discrimination perpetually enjoined by the Circuit Court sitting in equity.

The matters of complaint in the amended bill (Record, pp. 55, 57, 59) are substantially and only that the defendant, being a common carrier between the cities of St. Louis and Wichita, and St. Louis and Omaha, has established, maintained and still (at the time suit was brought) maintains in force on the line of its road between the said cities of St. Louis and Wichita, rates, rules and regulations governing freight traffic between said cities which are unjust and discriminatory, in favor of Omaha and against Wichita, and that the charge for such service rendered by said company in the transportation of the property and freight of the various classifications between the City of St. Louis and the City of Wichita is excessive and exorbitant to the detriment and hindrance of commerce and trade between said localities, and to the irreparable injury of the public, and that it maintains upon its line a tariff of freight rates governing all freight traffic passing between the City of Wichita and the City of St. Louis, by means of which it charges, demands, collects and receives a greater compensation for the transportation thereof over its railroad between the City of Wichita and the City of St. Louis, than it does for the transportation of freight and property of the same kind and classification between the City of Omaha and the City of St. Louis, notwithstanding the same are made at the same time and contemporane-

ously under similar circumstances and conditions, resulting, as it is alleged, in an unjust and unreasonable discrimination against shippers between the City of Wichita and the City of St. Louis, and subjecting the City of Wichita to an undue and unreasonable prejudice and disadvantage by reason thereof.

The amended bill does not charge that the rates are unreasonable *per se;* but only that the rates are unreasonable "to the extent and amount that such rates and charges to Wichita exceed the rates and charges to Omaha" (Rec., pp. 57, 58). This is important to be kept in mind.

A suit of this character is novel. No precedent for it exists. This is, therefore, a question of first impression; and it is one of great importance in its principles and possible consequences.

The suit stands upon the *amended* bill of complaint and the demurrer (Record, 55–60). It was first heard on a demurrer to the original bill in the Circuit Court of the United States for the District of Kansas before the Honorable JOHN A. WILLIAMS, District Judge, sitting in said jurisdiction, and who, on December 17th, 1894, rendered his decision overruling said demurrer, which decision and opinion is reported in 65 Federal Reporter, page 903 (Rec., 12–20).

After the said decision of Judge WILLIAMS on the demurrer to the original bill, the defendant company filed answer denying the alleged discrimination generally and in detail (Record, pp. 18–27). Exceptions to the answer were made and an amended answer filed (Record, pp. 33–52). Replication was filed (Record, p. 52). After all this, the parties made the stipulation found on page 53, to the effect that "it is desirable and best that the

questions of law arising upon the bill of complaint as amended and a demurrer thereto be first finally adjudicated and put at rest by the Circuit Court of Appeals of the United States and the Supreme Court of the United States," which it was stipulated might be done without prejudice to the right of the defendant if it were held that the bill was maintainable to a trial of the suit upon its merits.

The amended bill was accordingly filed (Record, pp. 55–60); demurrer thereto was filed (p. 61), and a decree rendered in favor of the complainant.

Said decree is in the words and figures below (Record, p. 62):

DECREE.

"This cause came on to be further heard at this term on the demurrer of the defendant to the amended bill of complaint, and was argued by counsel, and thereupon on consideration thereof it is ordered, adjudged and decreed that said demurrer be and the same hereby is overruled, to which the defendant excepted and excepts, and which exception is allowed by the court. And thereupon the defendant electing to stand on its demurrer, it is hereby ordered, adjudged and decreed that the Missouri Pacific Railway Company, its officers, agents and employees be, and they hereby are, perpetually enjoined and restrained from further establishing and maintaining in force upon its road freight rates, rules and regulations and charges governing the freight traffic between the City of Wichita and the city of St. Louis, by means whereof said defendant, its officers, agents and employees, are required to and do collect a greater compensation for the shipment of live stock, and for the shipment of any of the various classifications of freight mentioned in the amended bill of complaint, between the city of Wichita and the city of St. Louis, than it at the same time charges and re-

ceives for shipments of live stock and for freight of the same classification as set forth in said amended bill of complaint between the city of Omaha and the city of St. Louis, when any of said shipments are made under substantially similar circumstances and conditions.

And said defendant, its officers, agents and employees, hereby are perpetually restrained and enjoined from continuing to charge unreasonable, exorbitant and unjust rates and tariffs for the shipment of property and freight over its line between the city of Wichita and the city of St. Louis, and from continuing and putting in force upon said line of railway greater rates of freight charges for the transportation of freight of like classification between the city of Wichita and the city of St. Louis than it puts in force and maintains between the city of St. Louis and the city of Omaha, when said transportation is conducted under substantially similar conditions and circumstances.

It is also ordered, adjudged and decreed that the complainant have and recover from the defendant its costs in this behalf expended. And to the rendition of this decree and the injunctions therein contained, the defendant at the time excepted, which exception was and is allowed."

From this decree an appeal was duly taken by the defendant to the United States Circuit Court of Appeals for the Eighth Circuit.

The decree of the Circuit Court was affirmed by the Circuit Court of Appeals without costs to either party and without an opinion (Rec., 70).

The defendant company appeals to this Court.

ARGUMENT FOR APPELLANT.

A careful examination of the amended bill of complaint, and of the decree of the Circuit Court, will show that the only substantial issue involved relates to discrimination between localities; and that the charge of discrimination is grounded upon the alleged fact that the rates and charges between the City of Wichita and the City of St. Louis are higher over defendant's line of railroad than between the City of Omaha and the City of St. Louis, wherefore they are unjust and unreasonable (Record, p. 57).

The decree was accordingly limited to forbidding the defendant to charge more to Wichita than to Omaha.

It is manifest from the pleadings, opinion and decree of the Court above referred to (and it will doubtless be conceded by opposing counsel), that the Interstate Commerce Commission had never investigated the complaint in question, or made any order to desist or other order against this defendant (Sec. 15), or gave it any opportunity to be heard upon any charge or complaint by or before said Commission, but without any preliminary proceedings whatever and in the first instance, made the request for the institution and prosecution of proceedings as alleged in the amended bill of complaint. No such preliminary or other proceedings before the Commission or findings of fact by the said Commission are alleged in the bill of complaint; and this is an original, independent suit by the United States in equity, and not a suit to enforce any order or decision of the Commission.

The position of defendant, broadly stated, is, that

the complainants, the United States of America, have stated in their amended bill no sufficient facts to constitute a cause of action in equity, in their behalf against this defendant; that the case comes under no recognized head of equity jurisdiction; that the Act to Regulate Commerce has conferred no general equity jurisdiction over the case, but on the contrary has withheld such jurisdiction; that as matter of law the United States of America have not, pursuant to the Act to Regulate Commerce, upon which this bill is alleged to be founded, a right to maintain such a bill against this defendant, and that the Circuit Court *in equity* has no jurisdiction of said cause, or of the said bill of complaint, and cannot, by virtue of said Act or otherwise draw unto itself original and independent jurisdiction in equity of the cause set out in the bill. The remedy in such a case is that prescribed in the Act, viz., an investigation by the Commission and a suit or action to enforce its findings and orders (Secs. 13–16). These sections provide a complete plan of procedure applicable to the present case and which is inconsistent with the right of the United States to bring this independent bill.

In any event there is an adequate remedy at law, to wit, by action of law, or by *mandamus* as prescribed in the said Act.

We deny the right of the United States to prosecute in its own name and in a court of equity by original bill, the pretended cause of action set out in the amended bill; and we call in question the right of the United States attorneys, either upon the request of the Interstate Commerce Commission of the United States, or independent thereof, to institute a suit of *this* character against this defendant, except in the mode and by the procedure specifically enacted by Congress em-

powering them and said Commission thereunto; and for the following reasons:

(1) Because Congress, in whom resided all power over interstate commerce, delegated, by the Interstate Commerce Act, its power under the Constitution to regulate and control interstate commerce to the Interstate Commerce Commission, which is by said Act clothed with the power to primarily investigate, and execute the Act.

(2) Because this power conferred upon the said Commission to primarily investigate and put into execution the Act is, *in suits of the character in question*, exclusive, and the courts cannot act upon such case or suit until such primary or preliminary investigation has been had.

(3) Because no remedy by injunction for the wrongs charged in this amended bill is given for any violation of the Act save as in Sections Nine and Sixteen of the Act provided, by and through the Commission and the Circuit Courts. The right is also given by Section Nine to sue at law "for mere recovery of damages claimed," in which case there is no relief by injunction, there being in such case an adequate remedy at law. No remedy by injunction is given for such violation of the Act except for "disobedience" of a lawful order first made to "desist" or make "reparation," as provided in Section Sixteen.

(4) Because the only subject of the suit contemplated by the Act is injury to property and civil rights of the parties designated in the Act, which includes all possible classes of persons, corporations, as-

sociations, companies, municipalities, etc., and by rule of construction excludes the Government, which has not, under the act or independent thereof, any national or special or property interests in such suit, and excludes the right of the United States to bring a bill in equity in its own name such as the present bill, and because the circuit court sitting in equity has no jurisdiction to enforce the alleged public duty of the defendant company or to make such a decree as the decree rendered in this cause. The cause stated in the amended bill is not cognizable in a court of equity, at least in the absence of a statute giving equity jurisdiction over such a controversy.

(5) Because the amended bill cannot be maintained against an existing schedule which is presumptively legal until the Commission charged by the act with knowledge of such schedule has notified the carrier of an alleged wrong under the act and to desist (Section 15), and the statutory time and opportunity is given defendant after notice to alter the schedule or rate in force thereunder.

(6) Because the schedule in force is *prima facie* the legal rate in force so long as such schedule is in force.

(7) Because the making of the schedule in the first instance, whether single or joint, is wholly confided by section six, and, as declared by the Courts, to the carrier, which is required to publish the same in manner and form as approved by the Commission. The mere *regulation* of such schedule is by the same section solely committed to the Commission, and the Courts have no right or power to regulate schedules in the first instance in an original suit, it being the duty and

the sole prerogative of (1) the carrier to make and publish the rate as required by the Commission under the act; and (2) the Commission to challenge upon notice and investigation such schedule or rates when made and put into force by the carrier, and (3) the Courts to enjoin the carrier if it refuses to desist.

(8) Because the amended bill of complaint fails to state a good and sufficient cause of action against defendant in this: that all of its allegations and averments are mere conclusions of fact and law and do not allege facts, circumstances and conditions showing that the charges made and collected on the St. Louis-Wichita route, though greater than the St. Louis-Omaha route, are unreasonably and unjustifiably so under all the manifestly varied conditions and circumstances surrounding the shipment, and under the provisions of the Interstate Commerce Act. The amended bill and decree wholly ignore every necessary consideration and element of dissimilarity of condition and of circumstance as recognized by the act itself, and by the Courts in construing the act, and should state the *facts* showing there is an *unreasonable* discrimination and unreasonable preference and rate.

(9) Because the bill fails to state facts showing that there is either such mutual relation of the people of Wichita and vicinity and the city of Omaha to one another and to the St. Louis market or the business over the respective lines of defendant described in the bill, or such unreasonable discrimination or undue preference, or discrimination or preference at all, as to constitute a cause of action. The mere exhibit in the bill of the schedules on the two lines, and the

mere comparison of rates between states, or municipalities, or communities in different states, together with the mere allegation of discrimination and undue preference, and consequent injuries charged, do not state facts constituting a cause for the injunction order and decree sought by the bill, under the Interstate Commerce Act and the decisions of the Courts interpreting it.

From the foregoing statement of our legal position we deduce the following propositions of law, which we will now discuss in their order:

I.

THE INTERSTATE COMMERCE ACT IS A COMPLETE CODE OF LAWS AND RULES OF PROCEDURE, BOTH CIVIL AND CRIMINAL, GOVERNING INTERSTATE COMMERCE AND RADICALLY REVOLUTIONIZES ALL PRIOR PROCEDURE. ASIDE FROM PRIVATE ACTIONS AT LAW FOR DAMAGES BY PERSONS INJURED (SECS. 8, 9), THE SAID ACT CREATES NEW RIGHTS AND REMEDIES TO WHICH ALL RIGHT OF REDRESS IS LIMITED, AND WHICH THE GENERAL, OR COMMON LAW, SO CALLED, DID NOT GIVE.

It is common knowledge and it is history that prior to the enactment of the Interstate Commerce Act Congress had not exercised its power of regulation of interstate commerce, and so it was said in

I. C. C. vs. B. & O. R. R. Co., 145 U. S., 263, 275, that the common law:

"Demanded little more than that carriers should carry for all persons who applied in the order in which the goods were delivered at the particular station, and

that their charges for transportation should be reasonable. It is familiar history that Congress, prior to such enactment, had left the regulation of commerce largely and almost wholly to state legislation, with no attempt whatever by any general or special enactment to control this class of traffic. The inefficiency of these laws beyond state lines, and impossibility of securing harmony of action, emphasized the necessity of legislation by Congress under its constitutional power to regulate commerce, which finally resulted in what is known as 'the Interstate Commerce Act.' "

" The principal objects of the Act were to secure just and reasonable charges for transportation; to prohibit unjust discrimination in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preference to persons, corporations or localities; in inhibiting greater compensation for a shorter than a longer haul, and to abolish combinations for pooling of freights."

It will be observed from the foregoing that this Court holds that the common law did not afford any of the remedies which this analysis of the Court sets forth as being afforded by this act, except the mere power of requiring common carriers "to carry for all persons who applied in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable."

In that same connection this Court says of the opinion prevailing at that date, that:

"It was even doubted whether they (the carriers) were bound to make the same charge to all persons for the same service."

The point to be noted in the present case is that discrimination between *localities* (which is the sole

gravamen of the present suit) is not unlawful at common law, and can only become unlawful by statute; and hence the present suit must rest alone upon the Interstate Commerce Act, and the only remedy is the special remedy prescribed by that Act (Secs. 13 to 16).

Mr. McNulta, in discussing this subject before the Illinois Bar Association, said this was the:

"First substantial exercise of the power so delegated to Congress by the constitution, and the beginning of a new era in the management of the railroads of the country, and the transportation of all commodities thereon; that the Supreme Court of the United States, in its earlier decisions, had intimated, if it did not directly decide, that the power of control lay in the states until the federal government should act, that in effect, there was a concurrent state and federal jurisdiction, and that the former was potent upon all questions until it appeared there was a conflict, when the act of the latter should prevail as law; that under this ruling the field for legislation was left open to the several state legislatures, without uniformity of action until the decision of the Supreme Court of the United States in *Wabash R. R. Co. vs. Illinois*, 118 U. S., 557; this decision modified the former ruling, and held in effect that the grant gave to Congress exclusive power, *and until exercised by Congress in the form of the passage of the Act, it lay dormant.*"

Also in the statement made by the Interstate Commerce Commission itself, recommending to Congress an amendment to the Interstate Commerce Act, it is said that:

"The Interstate Commerce Commission is an arm of Congress, an agency created by it to execute the power expressly conferred on Congress to 'regulate commerce.' It exercises the power conferred upon it

for that purpose, subject to the same statutory limitations, and none other, as would rest upon the direct exercise of those powers by Congress itself."

This view has been reiterated in repeated decisions of the Federal Courts since.

In the decision of the United States Supreme Court in what is known as the "*Express cases*," 117 U. S., 1, it was substantially held that it was no part of the common law obligation of railway companies to furnish the same facilities or instrumentalities to all alike; that railway companies were not required by usage or by common law to transport the traffic of independent express companies in the manner in which such traffic was usually carried and handled; and so the doctrine has been extended to every species of transportation.

In *U. S. ex rel. Morris et al. vs. R. R. Co.*, 40 Fed., 101, 103, it is said by WALLACE, J.:

"These sections (Interstate Commerce Act), by declaring the special acts of discrimination unlawful, qualify materially in some respects the common-law rights and obligations of the carriers mentioned. By the common law, although public carriers are not permitted to make unreasonable discrimination in performing the services which they undertake between those whom it is their duty to serve, *the discrimination which is unreasonable is such only as inures to the undue advantage of one person or class of persons in consequence of some injustice inflicted upon another.* The carrier is not obliged to treat all who patronize him with absolute equality. Thus it is his privilege to charge less than fair compensation to one person, or to a class of persons, and others cannot justly complain so long as he carries on reasonable terms for them." Citing:

Menacho vs. Ward, 27 Red. Rep., 530.

From the foregoing authorities, and especially the Supreme Court case of the *Commission vs. Railway Co., supra* (145 U. S., 263), even the general or common law remedy was limited to a reasonable charge, and consequently *the sole remedy was a common law action for damages. Equity had no jurisdiction and could not act in such a case.*

And in *I. C. C. vs. C. N. O. & T. P. R. Co.*, 167 U. S., 505, 506, the Court in substance says that the Interstate Commerce Act *has incorporated in it* this common law principle and obligation; and it also directs the Commission to execute and enforce the provisions of the Act. In addition to this the Commission has other important duties, among which are the general duty of inquiring as to the management of the business of the carriers, to keep itself informed as to the manner in which the same is conducted; the right to compel complete and full information as to the manner in which such carriers are transacting their business, to see that there is no violation of the long and short haul clause, that there is no discrimination between individual shippers, and that nothing is done by rebate or other device to give preference to one as against another, and that no undue preferences are given to places or individuals, but that in all things the equality of right which is the great purpose of the Act, shall be secured to all shippers (pp. 505, 506).

From the above authorities and from a careful analysis of the act itself, it is seen that whatever was before the act the common or general law, applicable, is incorporated in it, and that only by and through the Interstate Commerce Act have the remedies and rights been secured to either "citizen," "firm,"

"corporation," "association," "locality," "body politic" or "municipality" against either unjust discrimination in the rendition of like services under similar circumstances and conditions, or to prevent undue or unreasonable preference, or to prevent an unreasonable charge, or other offenses inhibited by the Act. To this there is no exception, except possibly an action by a person for *damages* (Secs. 8, 9), and the right to a *mandamus* given by the Act of March 2, 1889.

In this connection we invite the Court's attention to the governing rule of statutory construction.

In *Sutherland on Statutory Construction.* § 204, the author says:

"If a new power be given by an affirmative statute to a certain person by a particular designation, although it be an affirmative statute, still all other persons are in general excluded from the exercise of the power, since *expressio unius est exclusio alterius.* Thus, if an action is to be brought before the justices of Glamorgan in sessions, it cannot be brought before any other person or in any other place. If a thing is limited to be done in a particular form or manner it excludes every other mode, and affirmative expressions introducing a new rule imply a negative."

And in § § 325-6 he says:

"The maxim is applicable to a statutory provision which grants originally a power of right. In such cases the power or right originates with the statute, and exists only to the extent plainly granted; the right while inchoate, and the power so far as not exercised, cease, if the statute be repealed, and if the statute provides the mode in which they shall be exercised, that mode must be pursued and no other. This conclusion is almost self evident; for since the statue creates and regulates, there is no ground for claiming or proceeding except according to it. In other words, where a

statute gives a new right and prescribes a particular remedy, such remedy must be strictly pursued and the party is confined to that remedy. 'The rule is certain,' says Lord Mansfield, 'that where a statute creates a new offense, by prohibiting and making unlawful anything which was lawful before, and appoints a specific remedy against such new offense (not antecedently unlawful), by a particular sanction and particular method of proceeding, that particular method must be pursued and no other.' "

Also:

"Where authority is given to do a particular thing, and the mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded."

And in note to § 204 he says:

" *When the statute creates a liability not existing at common law, and gives a particular remedy, here the party must adopt the form of remedy given by the statute.*"

We have seen that this Court in the case of *I. C. C. vs. B. & O. R. R. Co., 145 U. S., supra*, and the other cases cited (and there have been a number of subsequent decisions of this Court to the same effect), has held that *a new power* and right were given by this Act, and strictly within the foregoing rules of construction, to certain persons *by particular designation* for an action or proceeding upon a statute, and under and by virtue of which statute a liability was created not existing at common law (or under the general law), and *giving a particular remedy*, and which statute *creates and regulates*, and which gives *a new right*, and which remedy must be directly pursued, and whereby authority is given to do *a particular thing* by a *particular* mode, *excluding all*

other modes, whereby and by such affirmative legislation a "*new rule is introduced implying a negative.*"

Our contention is that upon the authorities and upon a fair construction of the act itself, as we shall presently see, and by every rule of construction, the Interstate Commerce Act is necessarily exclusive as a rule or system of procedure for primary examination into the facts, and in the language of the Act for "the execution and enforcement of its provisions" (Sec. 12).

In support of our contention we refer to the case of *Fourth National Bank vs. Francklyn*, 120 U. S., 747, in which this Court held that when a law creates a right and remedy "that remedy alone is the remedy." It follows, logically, that where, as here, the Congress delegates its power to a commission to invoke equitable relief by injunction only after that commission has done certain other pledges, then that remedy is exclusive.

In *U. S. vs. Hudson*, 7 Cranch, 32, it is held that the Courts of the United States have no common law jurisdiction in cases of libel against the Government of the United States, and in the discussion of that question it was held, as it has been consistently held from that date to this, that:

"Of all the courts which the United States may, under their general powers, constitute, one only—the Supreme Court—possesses jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it. *All other courts created by the general government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general government will authorize them to confer.*

"It is not necessary to inquire whether the general

government, in any and to what extent, possesses the power of conferring on its courts a jurisdiction in cases similar to the present; it is enough that such jurisdiction has not been conferred by any legislative act, if it does not result to those courts as a consequence of their creation."

The foregoing line of reasoning, followed in repeated decisions, leads, we submit, irretistibly to the conclusion that no Court of the United States has jurisdiction, right, or power to hear and determine causes, except such as are derived from Congress, and the only laws enforceable in such Courts are such laws as are enacted by Congress in pursuance of the Constitution.

However this may be in general, it is all sufficient for the present cause that discrimination between "localities" is only made illegal by Section 3 of the Interstate Commerce Act. Therefore it is a right newly created by the Interstate Commerce Act. Equality of treatment as between localities being a right created by the Interstate Commerce Act, it follows that the remedy therefor prescribed by that act is the only remedy, and that remedy is a preliminary investigation by the Commission (see Sections 3, 13, 15 and 16), and not by an independent suit in equity without any such preliminary investigation or findings by the Commission. Congress has prescribed *for discrimination between localities* a remedy by and through preliminary action and findings by the Commission, and it has nowhere provided that an independent bill in equity may be brought in such a case. On the contrary, the right to file such a bill is excluded by the very nature of the specific remedies which are provided in the act, to wit, investigation by the Commission in the mode prescribed by the act, and the

enforcement of its findings as in the act provided (Sections 3, 13, 15 and 16). These specific remedies and the rights of the railway carrier thereunder are inconsistent with the right to maintain such a bill as the present.

And this view does not at all conflict with *West. Union Tel. Co. vs. Call Pub. Co.*, 181 U. S., 92, which was on a cause of action cognizable by the common or general law.

II.

THE INTERSTATE COMMERCE ACT MAKES SPECIAL PROVISIONS FOR THE REMEDY BY INJUNCTION, AND SUCH REMEDY IN CASES LIKE THE PRESENT CAN ONLY BE OBTAINED THROUGH A PREVIOUS INVESTIGATION BY THE INTERSTATE COMMERCE COMMISSION.

As we have endeavored to show under proposition (I) the Act prescribes a complete procedure—civil and criminal. Under the criminal branch, wholly covered by certain sections of the Act, certain violations are made misdemeanors and felonies and denounced by pains and penalties. Under the civil branch, covered by certain other sections, as we shall presently see, the usual and necessary remedies at law and in equity are provided and distributed.

In all civil actions for recoveries, as at common law, and which are within the seventh amendment of the Constitution, and where a jury is demandable of course, provision is made to go into the federal courts on the law side, and also suits for equitable relief in the same

courts on the equity side, and providing especially for the remedy by injunction there, *but in cases like the present only and solely by and through the Commission*, as we shall now proceed to show.

Analysis of the Act as to Remedies.

By the provisions of § 8 the general liability of the common carriers violating the act to the injury of any *person* or *persons* is declared. This liability is one for damage in such amount as may be found, with attorney's fees and costs. This is the complete provision of this section.

By the provisions of § 9 such persons as are so damaged are given two distinct remedies; but the section expressly provides they shall not have both and must elect. One remedy is by suit at law "*by suit in his or their own behalf*, for the recovery of the damages to which the carrier is made liable" by § 8. The other remedy is upon "*complaint to the Commission as hereinafter provided for.*"

§ 10 is penal and is limited to the provision making the willful omission or commission of the prohibited things in violation of the Act, misdemeanors, and providing for the punishment of the same.

It is important, as respects equity jurisdiction, to notice that this section makes *the corporation itself* as well as its officers and agents guilty of a misdemeanor and indictable and punishable for any willful violation of *any* provision of the Act.

§ 11 creates the Interstate Commerce Commission.

§ 12, as we shall hereafter more fully show, defines the powers of the Commission, generally. We will

only say in this place, that this power by express, provision, and interpretation is limited to (1) primary investigation of facts; (2) to execute and enforce the provisions of the act, *but only in the mode* and manner and by the procedure provided by the act now under consideration.

Sections 13 to 16, inclusive, provide a complete plan of procedure, in cases like the present, aad in terms and purpose are utterly inconsistent with the right of the United States to bring or maintain the present bill.

§ 13 provides substantially, that:

"Any person, firm, corporation or association, or any mercantile, agricultural or manufacturing society, or any body politic or *municipal organization*, complaining of any of the things done or omitted (in the foregoing sections) may apply to the Commission *by petition*, which shall briefly state the facts, whereupon the Commission shall forward to the carrier so charged a statement of such charges, who shall be called upon to satisfy or answer such complaint."

"But if such carrier shall within a specified time make reparation, it shall be relieved of liability. But if it shall not satisfy the complaint within the specified time, or there shall appear to be any reasonable grounds for investigation, it *shall be the duty of the Commission to investigate the matte s complained of* in such manner as it shall deem proper.

Said Commission *shall in like manner* investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and may institute any inquiry on its own account in

the *same manner* and to the same effect as if complaint had been made.

No complaint shall at any time be dismissed because of the absence of direct damage to the complainant."

Inasmuch as this section, in connection with Section 3, extends not only to "persons," "firms" and "corporations," but to "municipal organizations" and "localities," and also to railroad commissions and commissioners of the several States and Territories, entitling them or any of them to complaint to the Commission of "*anything* done or omitted" in contravention of the act, and inasmuch as it is provided that no complaint shall be dismissed because of the absence of direct damage to the complainant, it is thus demonstrated that Section 9 was intended to prescribe proceedings not only where individuals, but also where the public and localities were interested; and inasmuch as this section makes it by express and imperative words the *duty of the Commission itself* to investigate matters complained of, it is inconsistent *both with the language and purpose of the act to hold that* the Commission may abdicate this duty and unload it upon the Courts, as the Commission has sought to do in the present instance.

Consistently with this view and to carry out the purpose of the Act, the provisions of Sections 14, 15 and 16, presently to be referred to, are all based on the idea that the commission will *itself* discharge this personal or official duty, as an examination of the language of these sections will clearly show.

And in this connection we may observe that the counsel for the appellee in their brief (pages 15 and 16), after quoting the Amendatory Act of March 2,

1889, and referring to Section 9, says (page 16 of their brief) :

" under the construction contended for by appellant an application for a writ of mandamus could not be made under the provisions of the Amendment to the Act thus quoted (to wit, the Act of March 2, 1889), unless the person applying for the writ had first submitted his grievance to the Commission."

This is a *non sequitur*, for under Sections 8 and 9 an express right of action in the Courts is given to any person or persons injured for the full amount of damages sustained, and in the Act of March 2, 1889, jurisdiction is expressly given to the United States Courts to enforce, at the instance of any relator against whom any discrimination is made, the provisions of the Act securing equality of terms and conditions; but it will be noted that the remedy specially prescribed by Congress in such cases is *mandamus*, and this remedy of *mandamus* thus specially provided for necessarily excludes the remedy by injunction.

§ 14 provides that:

" Whenever an investigation shall be made by it, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found.

" All reports of investigations made by the commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of."

§ 15 provides that:

"*If in any case* in which an investigation shall be made by said Commission it shall be made to appear to the satisfaction of the Commission, either by the testimony of witnesses or other evidence, that anything has been done or omitted to be done in violation of the provisions of this act, or of any law cognizable by said commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it *shall be the duty of the Commission* to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier *to cease and desist* from such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time, to be specified by the Commission; and, if, within the time specified, it shall be made to appear to the Commission that such common carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the Commission, or to the satisfaction of the party complaining a statement to that effect shall be entered of record by the Commission, *and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law.*"

All this is, we repeat, utterly inconsistent with the right of the United States to bring or maintain such a bill as the present, as such a course deprives the Railway Company of the right to "desist", &c., expressly given to it.

§ 16 provides substantially (it being too long to qoute here in full):

"That whenever any common carrier shall violate, or refuse or neglect to obey or perform any lawful order or requirement of the Commission created by

this Act, *not founded upon a controversy requiring a trial by jury* as provided by the seventh amendment to the Constitution of the United States, it shall be lawful for the Commission or for any company or person interested in such order or requirement, to apply in a summary way, by petition, to the circuit court of the United States sitting in equity * * * alleging such violation or disobedience as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable."

It then provides that the Court shall proceed to hear and determine the matter speedily and informally, and that the Court shall have power, if it thinks fit, to direct and prosecute in such mode and by such persons as it may appoint, such inquiries as the Court may deem needful to form a just judgment upon such petition, and on such hearing the findings of fact and report of the Commission shall be *prima facie* evidence.

It further provides:

"And if it be made to appear to such Court on such hearing or on report of any such person or persons that the lawful order or requirement of said Commission drawn in question has been violated or disobeyed, it shall be lawful for such Court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission, and enjoining obedience to the same."

It then provides for punishment for violation of the order of the Court, and for appeal to the Supreme Court. It also provides that when such petition shall be filed or presented by the Commission it shall be the

duty of the District Attorney, under the direction of the Attorney General of the United States, to prosecute the same.

It further provides that:

"If the matters involved in any such order or requirement of said Commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, and any such common carrier shall violate or refuse or neglect to obey or perform the same, after notice given by said Commission as provided in the fifteenth section of this Act, it shall be lawful for any company or person interested in such order or requirement to apply in a summary way by petition to the Circuit Court of the United States sitting as a court of law * * * alleging such violation or disobedience as the case may be; and said Court shall by its order then fix a time and place for the trial of said cause."

It further also provides that at the trial the findings of fact made by the Commission, as in equity cases, shall be *prima facie* evidence; also for a jury, if demanded, and for appeal as in equity cases. It is further provided that for the purposes of the act, excepting its penal provisions, the Circuit Courts of the United States shall be deemed to be always in session.

The foregoing is substantially all of said § 16 applicable to procedure in civil cases.

All of the succeeding sections relate to the organization of the Commission, the conduct of its business, its general offices and office force, and its duty to make certain reports, and to certain exceptions within the act not applicable to procedure, except the last section, being § 10 of the Amendatory Act of 1889, which gives the right to any person, firm or corporation to sue out in the Circuit or District Courts of the United States

the writ of mandamus to prevent certain violations, but which is not applicable to the case at bar.

The foregoing is a complete summary of the procedure we have hereinbefore fully described for actions at law and suits in equity in the Circuit Courts of the United States.

Legal Effect of the Act as to Equity Jurisdiction.

The foregoing analysis of the governing provisions of the sev-eral sections quoted (being every provision for procedure civil) enforces the conviction that (1) there the only remedy by injunction is, in cases of alleged discrimination between localities, the one here provided; (2) that in order to obtain it there must first be an act of commission or omission creating the liability prohibited in § 8; (3) the person, firm, &c., injured must make complaint as in §§ 9 and 13 provided, or sue at law as in § 9 provided, thus, "*electing*" his remedy as that section requires. If he elects to sue for damages, that is an action within the seventh amendment as provided in § 16, and, of course, not remediable by injunction. Besides, if the carrier is solvent, there is adequate remedy at law. (4) But, if he does not elect to sue as in § 9 provided, *he must* "*make complaint to the* Commission" (§ 9); and § 13, extending the provision, provides that:

"*Any such person, firm, corporation, municipal organization*, etc., complaining of anything done or omitted to be done (as in § 8 provided) by any common carrier in contravention of the provisions of the Act may apply to said Commission by petition (as provided in § 9) briefly stating the facts, "*whereupon* a statement

of the charges shall be forwarded by the Commission to the carrier" (§ 13). And also:

"Thereupon the Commission must give the carrier 'notice' and 'an opportunity to *desist*' or 'make *reparation*'" (as provided in §§ 13, 14 and 15).

§ 15 provides that:

"If within the time specified it appears to the Commission that the carrier has ceased from such violation (as provided in § 15) and made reparation, a statement to that effect shall be entered of record and the carrier relieved of liability or penalty for such particular violation."

But, "*whenever any carrier shall, as defined, violate or refuse or neglect to obey or perform* any lawful order of the Commission *not founded* upon a controversy requiring a jury trial,"

then application may be made by petition by the Commission or injured person to the Court as heretofore shown by § 16.

§ 13 also provides that:

"The Commission may in like manner investigate any complaint of the railroad commission of a state or institute inquiry on its own motion *in the same manner and to the same effect* as upon complaint."

In all cases of investigation the Commission

"*Is required to make a report of the facts*, together with its recommendation, and which report and findings shall be *prima facie* evidence," etc. (§ 14).

Thus, as we have said, is provided a complete civil procedure on both the law and equity sides of the Courts leading up on the equity side in non-juris cases to the remedy sought here, but *only* and *wholly* by the very steps provided as conditions precedent thereto.

Even if the complainants were claiming in this suit injunction against *unreasonable charges per se*, we say they can not get it for two reasons: (1) If they seek it independent of this Act and at common law, then injunction is not and never was the remedy for this offense at common law, especially where as here, there is no claim of insolvency; (2) If in equity, then they must reach the relief sought by the provisions of the Act—the only possible way; (3) If by virtue of and under the Act (conceding that the facts makes it possible in that way), then they have utterly failed to comply with it.

If they seek, as they do, injunction against *unreasonable discrimination and preference between localities*, we have shown there never was such a remedy for such acts at common law, if indeed there ever was or is any national common law in such a case.

Before the amendment to §16 giving the right of recovery at law there existed only the right of equitable relief.

Malcoon vs. C. & N. W. R. Co., 3 I. C. R., 715.

In this case the Commission cite a number of former cases in which they held that where complainant had been subjected to unreasonable prejudice and unjust discrimination and claimed damages, and where the Commission found his complaint well grounded and ordered the carrier to cease and desist therefrom, the Commission declined to go into the question of damages for the reason that:

"Under the seventh amendment to the Constitution of the United States the defendant in any case of damage is entitled to a jury trial."

The Commission further say:

"The amendment of March 2, 1889, was made to cover this feature of the statute."

The Commission further state on page 716 that:

"In most of the complaints brought before the Commission since the amendment of the sixteenth section the question of reparation for past damages has not been involved. In some cases where that question was involved its determination seemed so particularly appropriate for a jury that the Commission did not consider it; deeming it best for all parties that the question of the amount of damages should be settled by a jury in the regular courts, notwithstanding the fact that it has been held by the Circuit Court of the United States for the Western District of Pennsylvania in the case of *Riddle vs. N. Y., etc., R. Co., supra*, that where the question of reparation for damage has been submitted to the Commission it cannot be subsequently made the subject of a suit in court though the Commission has declined to pass upon it."

It further says:

"Although reparation for alleged violations of some of the provisions of the first four sections of the Act to Regulate Commerce is the principal and important remedy sought in most complaints, yet reparation in many cases is not an unimportant incident. Therefore so long as these rulings of the courts last mentioned stand as the law it seems to us a plain duty to complainants to pass upon the question of reparation for damages whenever a claim is made therefor. Indeed it seems to us to rise beyond mere discretion and become an imperative duty; otherwise the dual remedy which Congress seemed to contemplate would be defeated; even more, one of the remedies is lost under an application of the somewhat technical doctrine of the *election* of remedies operating in contravention at

least of the spirit of the enactment as well as the demands of justice."

We cite this to show the recognition by the Commission of our contention for the two specific elective remedies, one at law, the other by injunction.

Hitherto Uniform Course of Procedure in Cases of this Character is Against the Right to Maintain the Present Suit.

An examination of the whole course of the Interstate Commerce Commission will disclose that they have in every single instance, excepting in the case at bar, pursued the course so clearly defined by the act, and it is manifest that the Commission itself recognizes the procedure we insist upon here.

But they find an easy, natural and speedy remedy to reach the equity side of the court through and by the provisions of the act requiring them in every instance to hear the facts and report them as *prima facie* evidence to the court for use of complainant when he sees fit to resort to the court, or the Commission itself exercises its right to do so, and, as provided in the act, makes this report the basis of its action.

Moreover, there is an uniform recognition in the decisions of this Court and other Courts of this procedure for the Commission in its administrative work of investigation and execution and enforcement of the provisions of the act.

The case of *I. C. C. vs. N. E. R. Co.*, 74 Fed. 70; 5 I. C. R., 650, decided by Judge SIMONTON, April 30th, 1896, was a suit where the Truck Farmers' Association of Charleston filed complaint be-

fore the Commission against an unreasonable and unlawful rate on their products, an order to cease and desist was entered by the Commission and for an adjustment of the rates. A copy of the order was served upon the railway companies defendant. The railroad companies failing to obey the order, the Commission filed its complaint against them charging that defendants wilfully failed and neglected to obey and conform to the requirements of the Interstate Commerce Commission as set forth in the original order of the Commission, and praying for writ of injunction restraining defendants, their officers and agents, from such disobedience, and that the Court would make a final order for a mandatory and permanent injunction. The Court held, as shown by the syllabus, that:

"The sole authority of the Commission to institute proceedings in the United States Circuit Court to enforce its orders, is derived from the Interstate Commerce Act, and in its exercise it is bound by and must confine itself within the terms of that statute; that said Act authorizes a resort by the Commission to the United States Court only in case of the violation of or neglect or refusal to obey or perform a lawful order or requirement of the Commission."

If this is a sound construction of the act (as we insist it is) it is fatal to the right to maintain the present suit, and the demurrer to the bill ought to have been sustained and the bill dismissed and the decree below ought to be reversed.

And in the case of *I. C. C. vs. L. & N. R. Co.*, 73 Fed. Rep., 409; 5. I. C. R., 657, decided April 17th, 1896, it was held that:

"The jurisdiction of the United States Circuit Court is limited to an approval or disapproval and to an en-

forcement or refusal to enforce an order of the Commission; that the Court may go fully into the proof to determine whether it will approve an order made by the Commission and may hear any additional proof; that the function of the Commission is both *quasi* judicial and administrative in its nature; that it is required to make reports in writing in respect of complaints made to it; that such reports must include the findings of fact, and such findings to be deemed *prima facie* evidence; that it was the intention of Congress that the procedure before the Commission should substantiallly conform to that before a court charged with the duty of finding facts and giving a judgment thereon, or to the investigation or report of a referee or special master in chancery passing on both facts and law; that in order that the finding and opinion of the Commission should have value it should conform to the purpose of Congress requiring such proceedings."

An examination of this case will show that the procedure for which we are contending here is recognized as a condition precedent to equitable relief.

This view, if sound, is fatal to the present suit.

And in the case of *Swift & Co. vs. P. & R. R. Co.*, 58 Fed. Rep., 858; 4 I. C. R., 633, and *Swift & Co. vs. P. & R. R. Co.*, 64 Fed. Rep., 59, opinions by Judge GROSSCUP, it is held that:

"Outside of the Interstate Commerce Act there is no law of the United States as a distinct sovereignty, imposing any restraint upon the imposition by a carrier of unreasonable rates; that the Interstate Commerce Act prescribes the only procedure by which the courts can obtain jurisdiction over interstate commerce cases.

That *there being no pronouncement of Congress upon the subject of interstate commerce, either expressly or impliedly outside of the Interstate Commerce Act,*' and

the action before him at that time for unreasonable charge, he held that the suit, 'not having been brought under the Interstate Commerce Act there is no law either of the United States or of the state applicable to the case in hand and there can therefore be no recovery.'"

This decision, also, is fatal to the present suit.

Also, see:

State vs. R. R. Co., 17 Neb., 647.

I. C. C. vs Ala. M. R. Co., 168 U. S., 174;

I. C. C. vs. C. N. O. & T. P. R. Co., 167 U. S., 495–506; and cases cited.

Texas Pacific R. Co. vs. I. C. C., 162 U. S., 204.

These cases, while not deciding the particular question here, yet all refer to this procedure and recognize it as defining the power and right to solely and primarily hear and determine cases of the kind at bar for violations of the first, second and third sections of the act.

It is also to be noticed that every case of importance and in which this Court has been called upon to determine the relative powers of the Commission and the Courts and their relation to the Interstate Commerce Act, has arisen out of proceedings had under these various sections of the act, constituting, as we claim, the procedure, and the sole procedure, by which these questions can be raised and litigated. That is why they have reached the Supreme Court of the United States.

So almost every case which has come before the courts has originated before, and in a primary hearing by the Commission, and not in any single instance, *until the present suit*, originally with the courts. It is a sig-

nificant fact that in the innumerable suits which have been litigated, save and except the present solitary suit here, both complainants and the Commission, as well as the courts, have deemed it proper and necessary to institute the proceedings in the first instance before the tribunal created therefor by the act itself.

There can at least certainly be no controversy as to whether the full power of "investigation" and "regulation" primarily, at least, is conferred upon the Commission. We are all agreed, as we understand it, in harmony with all the authorities, that the power which Congress had to "*investigate*" and to "*regulate*" interstate commerce and all means and vehicles of interstate commerce, was conferred upon this Commission. We nowhere claim Congress has taken the power or right from the courts in the proper judicial actions or suits by proper parties according to the rules and principles of law and equity, to finally hear and determine the questions of a judicial nature involved in such actions or suits, nor that the Commission cannot institute as prescribed in the Act certain other suits direct. We simply claim that owing to the inefficency of the general law and of the remedies under it, the Commission was created with full and *sole* power and right of "regulation," and "execution" and the further right and power to primarily *hear, determine and report* upon all complaints growing out of interstate commerce. *This* power, it will not be denied, is *exclusive*, certainly in cases not actionable by the common or general law. This is the only power and function the Commission has, as interpreted by the courts, in the cases just cited.

Inequality and Injustice of the Present Procedure. If sustained, it Deprives Carrier of the Right Expressly Given to "Desist" or Make "Reparation," &c.

Moreover, if the Court has original jurisdiction, as claimed by counsel--the power of proceeding at the mere request of the Commission—then inequality results because, if the Government presents a cause against a carrier through the Commission, the defendant then has the right of a *preliminary "hearing and investigation,"* and of "desistance" and "reparation" without further proceedings (Secs. 15, 16); but if the Government makes its attack originally in the courts, as here, then the defendant is denied the rights and privileges guaranteed by the act, and there is discrimination against the alleged discriminator. The weal or the woe of the defendant then depends on *how* the Government elects to make the attack. In some cases it will be prosecuting in the courts; in others, maybap at the same time, by the Commission. Sometimes the Commission itself will prosecute in the courts as they may do under the act. At others, the United States will prosecute either upon its own motion or upon the motion of the Commission, who may, according to the theory of of the Government's counsel, command the Government to prosecute, as in this case, quite independently of the Commission. This is clothing the Commission with undreamed of power, and subverting the whole power of Government to the behests and dictates of the Commission, while at the same time the carriers of the country, denied the constitutional equal protection of the laws vouchsafed by the Fourteenth Amendment,

are driven to this or that forum, in this or that jurisdiction, at the caprice of the Commission, the Government or the complainant. This is the *reductio ad absurdum* of the whole theory.

Moreover, the mode of trial as prescribed by this act is one way if tried by the Commission and through the Commission; another, if the case be originally instituted in the courts. The act guarantees to the common carrier and to the complainant:

"A proceeding to hear and determine speedily, as courts of equity, without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do equity" (Sec. 16).

But under this novel, original, unique, independent proceeding in the United States Courts, the right of "desistance," of "reparation," of any settlement which may be satisfactory between the parties (Secs. 15, 16), is denied to them in all cases where it is the pleasure either of the Commission, the Government, or the party complaining, to institute such original and independent suit.

We insist that the provisions of the act guarantee to every citizen and every carrier a consistent, uniform and established mode of procedure applicable alike to all parties, and all the foregoing decisions recognize it.

Judge Hook's Recent Decision Against the Right to Maintain This Bill.

That an original bill in equity will not lie against a railway company for discriminatory rates without the Commission has first investigated and acted, has been

recently decided by the United States Circuit Court for Kansas in *Vanderslice-Lynde Mercantile Company vs. Mo. P. Ry. Co.* As the opinion of HOOK, J., is not as yet regularly reported, we give it in an Appendix to this brief. That opinion shows very clearly how revolutionary of all preceding ideas and procedure the maintenance of an independent bill in equity, without any preliminary investigation by the Commission for discrimination between localties, would be.

Under these views the decree below is wrong and must be reversed and the bill dismissed.

III.

SECTION 12, UPON WHICH THE SUIT HERE IS ALLEGED IN THE BILL TO BE GROUNDED, DOES NOT AUTHORIZE COMPLAINANTS TO BRING OR THE COURTS TO HEAR THE SAME.

THE CONTROVERSY SET FORTH IN THE BILL—NAMELY, WHETHER THE RATES COMPLAINED OF ARE DISCRIMATORY, AS ALLEGED IN THE BILL, IS LEGAL AND NOT EQUITABLE IN ITS NATURE, AND ENTITLES THE DEFENDANT, UNDER THE SEVENTH AMENDMENT TO THE CONSTITUTION, TO A TRIAL BY JURY. SAID SECTION 12 DOES NOT ATTEMPT TO CHANGE OR ENLARGE THE JURISDICTION OF THE CIRCUIT COURTS IN EQUITY, OR TO AUTHORIZE A BILL IN EQUITY, SUCH AS THE PRESENT BILL, TO DETERMINE THE REASONABLENESS OF RATES OR DISCRIMINATION IN RATES, EITHER IN THE NAME OF THE UNITED STATES OR IN THAT OF THE COMMISSION, AND THE CIRCUIT COURT IN EQUITY HAS NO JURISDICTION, EITHER GENERALLY OR UNDER THE

INTERSTATE COMMERCE ACT OVER THE PARTICULAR CONTROVERSY PRESENTED BY THE BILL. THE REMEDY AT LAW BY ACTION OR BY MANDAMUS IS ADEQUATE.

The language of § 12 is that:

"The Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created, and the Commission is hereby authorized and required to execute and enforce the provisions of this Act, *and upon the request of the Commission it shall be the duty of any District Attorney of the United States to whom the Commission may apply, to institute, in the proper court, and to prosecute under the direction of the Attorney-General of the United States, all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violations thereof.*"

It is claimed by counsel for United States (Brief, POINT V., p. 41) that this provision gives express authority for the Commission, without preliminary investigation, without notice to the carrier, without a hearing or order or opportunity to desist, or to make reparation, or to have the matters of difference amicably adjusted as the act (Secs. 13, 14, 15) provides and guarantees, to request or order the District Attorneys of the United States to institute an original injunction suit against such carrier, notwithstanding the express provisions of the act relating to the institution and procedure in a suit of that character. But a careful examination of this provision fails to show that it was

the intention of Congress to do more than authorize the Commission to call upon counsel, where counsel are needed, to represent it in such enforcement of the provisions of the act as the Commission is authorized by other provisions of the act to enforce. In other words, the power of employment of counsel for enforcement is limited to the power, right and duties of the Commission in the act of enforcement. If, as we believe, we have conclusively shown, the Commission has the right (1) to appoint and have a hearing before it; (2) to make an order; (3) in case of disobedience to make a case or suit of it by bringing it under the provisions of § 16 into the courts to obtain the remedy here sought and there prosecute it to effect, then this is one of the cases in which the United States Attorneys can very properly be called to enforce the provisions of the act.

What is the reason that this provision may not, *inter alia*, refer to such suits, and to the bringing thereof in the very manner in which we insist that the law requires it to be brought? There is certainly in such proceedings much use for counsel and a very proper case in which counsel should be called under this general provision of this section.

But there are other provisions of the act which expressly provide for calling in the United States attorneys, namely:

In § 6, if a carrier refuses to file or publish its schedules of rates it is in addition to penalties subjected to writs of mandamus and injunction in the United States Circuit Courts to enforce the provisions of that section. This suit does not fall within said Section 6.

In § 9 it is provided actions for *damage* may be brought direct by the party injured in the United States District or Circuit Courts, this being one of the two remedies—by action at law direct, or, as we have seen, by injunction—(as the party may elect) *after the Commission has passed upon it*, as heretofore shown (Secs. 13, 14, 15, 16).

In § 10, and other sections, actions may be brought in said courts for the penalties therein provided and for damages "in an action on the case;" and in § 12 itself is provision for compelling attendance of witnesses and invoking the aid of the Federal Courts together, of course, with all their machinery. *No doubt that, as there is no express provision, or was none before this amendment of the twelfth section, by which the United States attorneys could be required to act, in all cases of violations of the act, this provision of the twelfth section for doing so was deemed expedient, and this explains the object of the provision.* This amendment to Section 12 extends the like limited provision found in Section 16 to ALL cases, and thus was the purpose of the amendment and gives it full effect.

Note in this connection that the clause in question also specially requires the district attorneys to "prosecute all necessary proceedings for the *punishment* of all violations of the Act"—all of which shows that the sole purpose and intent was to provide a legal force for the use of the Commission in both the civil and criminal procedure which we have discussed, but only to "enforce the Act" and "punish violations" in the mode and manner of that procedure.

It is wholly unwarranted to conclude from a provision that the Commission can call in the Federal attorneys, therefore, they can call in the Federal Courts to

do that, which under the provisions of the act neither the Commission nor the Courts, can do independently. Section 12 as amended, like section 12 as it stood before amendment, is to be construed in *pari materia* with the rest of the act. Indeed, the very fact that the Congress deemed it necessary to authorize them by this amendment to call in Federal attorneys, *shows that the provision was exclusively auxiliary to the Commission*, for if it could order the Courts, as in this suit, to take cognizance of a case in the first instance without acting upon it itself, *the provision is idle, for the Federal Courts of the country and the people already had the use af the federal machinery, including the federal attorneys.*

If we recur to the legislative history of the amendment to the 12th section as contained in the Congressional Record, September 13, 1888, Vol. 19, Part 9, Cong. Rec., 50th Cong., 1st Sess., p. 8577; *id.*, Vol. 20, Part 2, p. 1404, February 1, 1889; *id.*, February 4, 1889, p. 1475, it will be seen, as we think, that it was not intended by the amendment to Section 12 to enlarge or diminish or change existing remedies or modes of procedure, or to do anything more than to charge the Commission with the duty of taking the initiative for the enforcement of the Interstate Commerce Act by and through the remedies specifically provided for in the Act itself; much less was it intended to revolutionize the Act and dispense with the investigation and procedure on the part of the Commission therein so particularly provided for and required.

This Section 12 empowers the Commission to "execute and enforce the provisions of the act," and they are empowered to "call upon any district attorney of the United States to institute, in the proper court, and prosecute under the direction of the Attorney-General, all necessary proceedings" (1) "for the enforcement of the provisions of the act" (2) "or for the punishment of all violations thereof." This is all there is in Section 12 authorizing the Commission in the *execution and enforcement of the provisions* of the Act to apply to any District Attorney of the United States.

Now, what are the Commission by this Act (not this section only) authorized to apply to the District Attorneys to do? The answer is that this section, in addition to the other sections which specifically authorize an application to the District Attorneys, also authorizes and empowers the Commission to call upon these District Attorneys to enforce every and any provision of the Act which they are authorized and empowered to execute and enforce.

It seems plain that it was the intention of the Congress to fix, by definite terms in Section 12, the right and power to invoke the aid of the United States attorneys, under the direction of the Attorney-General, in the execution and enforcement of the provisions of the act, in the absence of any provision for a special counsel. It must have been apparent to Congress that, in the absence of any provision therefor, the commission would need an attorney, and they simply placed that duty and responsibility upon the District Attorneys and the Attorney-General.

This construction of Section 12 not only does not deprive this amendment of any substantial force or efficacy, but quite upon the contrary gives it the sub-

stance, force and efficacy which it would not otherwise have; for, according to the interpretation given it by the other side, its main use and purpose is to give the commission the aid of the Department of Justice only when an original suit like the one at bar has been brought.

What is meant by Section 12 is that the Commission, being authorized and required to enforce the provisions of the Act, and being authorized and empowered to "institute in the proper court and to prosecute all necessary proceedings for the enforcement of the provisions of the Act and the punishment of all violations thereof," it "shall be the duty of any district attorney of the United States to whom the commission may apply, to institute in the proper court and to prosecute under the direction of the Attorney General of the United States" all such proceedings.

Section 12 not only defines but limits the right and power of the Commission to call upon the United States Attorneys to do anything except to enforce the express provisions and remedies of the Act. There cannot be found, either in Section 12 or any other section of this act, any authority or right whatever either to institute an independent original action such as is brought here, or to prosecute any suit or action except the suit or actions specified in the Act.

These views seem to be unanswerable and demonstrate that the present bill is not maintainable and that the decree below is wrong.

This Form of Suit Not Authorized by Section 12.

We also make the distinct point that neither Section 12, nor any other provision of the Interstate Commerce Act, or any act of Congress, undertakes to give authority to bring an original and independent suit in equity in the name of the United States or in the name of the Commission, or any one else, to have determined the reasonableness of rates fixed by a railway company, or the question of alleged discrimination under Section 3 in favor of one locality to the preference or disadvantage of another locality, which is the gravamen in the present bill. If the United States should undertake to confer such jurisdiction the provision would contravene the seventh amendment to the Constitution of the United States, if such a controversy would, as we insist, be *legal* and not *equitable* in its nature. Under the Constitution of the United States law and equity must be kept distinct and separate, and this is observed throughout the Interstate Commerce Act, as will be seen by reference, *inter alia*, to Sections 6, 10 (at end of section), 13 and 16, and the amendatory Act of March 2, 1889, which expressly provides for the remedy of mandamus.

The act provides that violations of it may be prevented or redressed by indictment, by actions at law for damages by parties interested or injured, by proceedings in mandamus and in the prescribed cases (Secs. 6, 16) by proceedings in equity.

The common law made no provision for unjust discrimination by a common carrier between localities, as for example Omaha and Wichita. Unjust discrim-

ination between localities is forbidden by Section 3 of the Interstate Commerce Act. The remedies for its violation are only those which are prescribed by the act or suitable to the legal nature of the case to enforce the right. Now, the language of Section 12 as amended is simply that "upon the request of the Commission it shall be the duty of any District Attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney-General of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof" at the cost and expense of the United States. This act uses only the phrase "institute and prosecute all necessary proceedings" for the enforcement of the act and punishment of violations thereof. It does not prescribe what these proceedings shall be. The Commission might request proceedings by indictment, which indictment would have to be found, presented and tried in the regular way. If a civil remedy is sought, it will have to be such as is proper to the case, and inasmuch as the case stated in the bill is legal and not equitable in its nature the proceedings must be at law and not in equity, at least where Congress has not expressly provided that such proceedings may be in equity.

There is nothing in the act which enlarges the jurisdiction of the Circuit Court either generally or under the Interstate Commerce Act so as to authorize a bill in equity to have determined the question of unreasonable discrimination of rates between *localities* where there has been no previous investigation and finding by the Commission. That equity in such cases has no jurisdiction is well established.

IV.

No Remedy in Equity for Case Stated in Bill: The Interstate Commerce Act Confers no General Equity Jurisdiction, on the Contrary a Resort to an Original Bill in Eqtity is Excluded by the Special Provisions of the Act as to Remedies: The Remedy by Mandamus Adequate.

It is an indisputable proposition, in the absence of an express statute, that remedy by bill in equity is not the proper remedy to enforce the performance by a corporation of public duties prescribed by law, and especially to enforce by injunction penal statutes.

There is no such statute applicable to the present case. On the contrary, the special provisions as to injunctions in Sections 6 and 16 (and there are no others) and the provisions in Sections 8, 9, 10 (at end) as to actions for damages, and the special provisions for *mandamus* in Section 6, and the new section in the Act of March 2, 1889, exclude the jurisdiction in equity over a bill like the present, where the Commission has not acted.

The leading case in this country on the subject of equity jurisdiction over violations by corporations of public duties, especially when made indictable, is that of the *Attorney-General vs. Utica Insurance Company*, 2 Johnson's Chancery Rep., 371, which was decided by Chancellor Kent; the Attorney-General of the State of New York, instead of going into a court of law, went into a court of equity. An information was filed by

the Attorney-General, *ex officio*, charging the insurance company with being engaged in banking operations without any authority under the act incorporating them, and in violation of the prohibition in the act, to restrain incorporated banking associations. The information concluded not only with the usual prayer for process of subpœna, but for injunction to restrain the company from the business incident to incorporated banks.

The head-note expresses clearly Chancellor KENT'S views and decision together with a few extracts from the opinion:

Head-note.—"This Court has no jurisdiction over offenses against a public statute, or to restrain persons from carrying on the business of banking, in violation of the act passed the 6th of April, 1813, to restrain unincorporated banking associations; and a motion made by the Attorney-General, on an information filed by him *ex officio*, for an injunction for that purpose, was refused."

The case is stated in the first paragraph of the Chancellor's opinion:

"An information is filed by the Attorney-General, *ex officio*, against the defendant, charging it with engaging in banking operations without any authority under the act incorporating it, and in violation of the prohibition in the act to restrain unincorporated banking associations. The information concludes, not only with the usual prayer for process for subpœna, *but for an injunction to restrain the company from business incident to incorporated banks.* * * *

"The charge contained in the information savors, then, so much of a criminal offense that it would require a clear and settled practice to justify the interference of this Court, *when that interference is not called for in aid of a prosecution at law.* The charge

of the usurpation of a franchise has so frequently occurred, and the remedy by injunction is so convenient and summary that the jurisdiction of this Court would have been placed beyond all possibility of doubt and have been distinctly announced by a series of precedents if any such general jurisdiction existed. But I have searched in vain for this authentic evidence of such a power. The precedents are all in the Court of K. B., and Kyd cites nearly a hundred instances within the last century of informations filed in the K. B. to call in question the exercise of a franchise. * * *

"If a charge be of a criminal nature *or an offense against the public and does not touch the enjoyment of property*, it ought not to be brought within the direct jurisdiction of this Court, which was intended to deal only in matters of *civil right, resting in equity, or where the remedy at law was not sufficiently adequate.* * * *

"The plain state of the case, then, is that an information is here filed by the Attorney-General to redress and restrain by injunction the usurpation of a franchise, which, if true, amounts to a breach of law and of public policy. I may venture to say that such a prosecution is without precedent in this court, but it is supported by a thousand precedents in the courts of law. How, then, can I hesitate on the question of jurisdiction?

"The whole question upon the merits is one of law and not of equity. The charge is too much in the nature of a misdemeanor to belong to this court. The process of injunction is too peremptory and powerful in its effects to be used in such a case as this without the clearest sanction. I shall better consult the stability and utility of the powers of this Court by not stretching them beyond the limits prescribed by the precedents. Without, therefore, giving any opinion on the question whether the Utica Insurance Company are entitled to exercise banking powers, I am of opinion that I have no jurisdiction in the case before me and that the motion for the injunction must be denied."

" Application for the injunction is not because it is intended to be merely auxiliary to a proceeding at law. The entire and final remedy is sought in this Court. It is equally a question of law whether they were within the provisions of the restraining act. * * * It appears not to admit of doubt, nor do I understand it to be disputed, that if the defendants as a corporation have assumed powers not within their charter, the people of this State by their Attorney-General have a complete and adequate remedy at law. * * * I may venture to say that such a prosecution is without precedent in this Court, but it is supported by a thousand precedents in the courts of law. The whole question upon the merits is one of law and not of equity."

See, also, case of People vs. Same *(quo warranto)*, 15 Johns., 358, s. p.; Comwlth. vs. Bank, 28 Pa., 389 *(quo warranto)*; *Id.* (same matter of equity), p. 379.

In the brief on the other side much reliance seems to be placed upon the case of the *Attorney-General vs. Railroad Companies* (35 Wis., 425, 1874). The Supreme Court of Wisconsin in this case, on the special State legislation there in question, sustained the information in equity originally filed in the Supreme Court of the State by the Attorney-General of the State, acting for the State, praying for writs of injunction to restrain the defendant railroad companies from exacting tolls for the carriage of passengers and freight in excess of the rates prescribed by the said Act of 1874. Some general views of the Court are not entirely reconcilable with the decision of Chancellor KENT in the case of the *Attorney-General vs. the Utica Insurance Company, supra*, concerning which RYAN, J., said, " in that case

a very narrow and limited view of the jurisdiction of courts of equity was taken." At all events, the question of equity jurisdiction presented in the case at bar is not covered by the Wisconsin case, as will appear from the eighth paragraph of headnotes of that case, which is as follows:

"8. It seems that the rule that equitable proceedings will not lie to enforce a statute which provides penalties for all violations thereof is not applicable to an information of the Attorney-General to restrain the violation of public right by a corporation. *But it was not necessary to decide that question here.*"

Inasmuch as Section 10 of the Interstate Commerce Act makes the railway corporation itself indictable, and provides penalties for all violations thereof, not only against the agents and officers of the corporation, but the *corporation itself*, we have here in the case at bar the very question which the Supreme Court of Wisconsin said in that case it was not necessary to decide.

Moreover and conclusively, the *Wisconsin case* is not applicable, because there was not under the Wisconsin legislation a commission with powers and duties like those enjoined by the Act to Regulate Commerce on the Interstate Commerce Commission, and no provisions such as those found sections, 13 to 16 in said Act inconsistent with the right to bring and maintain an original bill in equity.

The Supreme Court of the United States has always maintained the distinction between mandamus and relief in equity. Their respective functions are distinct.

Thus, mandamus and not a bill in equity lies to compel municipalities to levy taxes according to their contract duty.

Walkley vs. Muscatine, 19 Wall., 167.
Heine vs. Levee Commrs., 19 Wall., 655.
Barkley vs. Levee Commrs., 93 U. S., 258.
Thompson vs. Allen County, 115 U. S., 550.
Rosenbaum vs. Bauer, 120 U. S., 450.
Smith vs. Bourbon County, 127 U. S., 105.
Butterworth vs. United States, 112 U. S., 50.

Remedy to compel performance of public duty by corporations is by mandamus and not in equity. The principle is elementary. It is indeed fundamental. To those who recall the nature and extent of the superintending jurisdiction of the Queen's Bench over all public bodies and corporations, exercised largely by mandamus, and in connection with this the historical development of equity as a supplement to and aid to law where the legal remedies were inadequate, the principle is extremely clear.

Re Sawyer, 124 U. S., 200, where the general subject is fully considered.
Hannewinkle vs. Georgetown, 15 Wall., 547.
Dows vs. Chicago, 11 Wall., 108.
Many cases, Federal and State, are cited in Dillon, Munic. Corp. (4th Ed.), Secs. 826, 906-908.

In the *Federal Courts*, by express Act of Congress, there can be no case of equitable cognizance where there is a plain and adequate remedy at law (see cases last cited, and also Ewing vs. St. Louis, 5 Wall., 413).

The said Act of Congress provides that "suits in equity shall not be sustained in either of the Courts of the United States in any case where a plain, adequate

and complete remedy may be had at law" (Rev. Stats., Section 723).

The duties in question in the present cause are public duties *simpliciter* and strictly. They do not relate to property or private property rights, and therefore are not within the class of subjects to which the jurisdiction of equity extends, for in the language of Mr. Justice GRAY (*Re* Sawyer, 124 U. S., p. 210), **"the office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property."**

That the remedy in this case by mandamus is adequate is demonstrable by a very short statement, to wit:

If the facts stated in the amended bill of complaint in this case had been stated in an information by the United States on the relation of the Interstate Commerce Commission, or on the relation of the City of Wichita, or on the relation of the District Attorney or the Attorney-General of the United States, asking for a mandamus commanding the defendant to do what is sought by this bill in equity, to wit: to "collect no greater compensation for the shipment of live stock and for the shipment of the various classifications of freight between the City of Wichita and the City of St. Louis, than the defendant at the same time charges and received for shipments of live stock and freight of the same classifications between the cities of Omaha and St. Louis," etc., etc. (Record, p. 59), precisely the same result

would have been obtained as is sought by the bill in equity. This being so, it is clear that the remedy by mandamus is, as applied to the case stated in the bill, is just as complete, just as adequate; in fact, precisely identical and coincident with the relief sought in the bill in equity, and therefore a court of equity has no jurisdiction. Why? Because the remedy at law is adequate, and, therefore, that remedy must be resorted to since it gives the defendant the benefit of a trial by jury, to which it is entitled under the seventh amendment of the Constitution, which benefit the defendant is deprived of if an original bill in equity like the present will lie.

Moreover, if the remedy by mandamus is adequate (as it is above shown to be), then the Act of Congress above quoted expressly forbids the maintenance of a suit in equity in the Courts of the United States.

Our point is that if in a case of alleged discrimination between *localities* a prior investigation by the Commission is not in all cases necessary, then the remedy by *mandamus* is adequate and an independent suit in equity will not lie.

Argument on Want of Equity Jurisdiction of the Present Bill Summarized.

It is clear that without the Interstate Commerce Act or some other statue of Congress, a bill in equity in the Federal Courts of the United States would not lie for discrimination in rates either between private shippers or between localities, and incontestably not for discrimination between *localities*, which is all that is material in the present cause. And the reason

is plain—namely, because the whole power of Congress over the subject of railway regulation rests on the power given in the Constitution to regulate interstate commerce, and until Congress acts and prohibits such discrimination, no remedy therefor exists in law or in equity; and, therefore, such discriminations, in the absence of such statute, would be irremediable either at law or in equity. The Interstate Commerce Act prohibits unjust discrimination between localities—a new right created by the act. It creates a commission for the purpose of examining into alleged violations of the Act, and makes it the duty of the Commission, at its own instance, or at the instance of "persons," "firms," "corporations" or "localities," to make such examinations. The questions involved in such investigations have been recently declared by one of the Interstate Commerce Commissioners to be "traffic questions, for the most part requiring for their understanding and determination expert knowledge in a high degree. This knowledge the Federal Judges do not possess in any degree. The time of the Courts is fully occupied with other matters." It was because of these and like considerations that Congress created the Interstate Commerce Commission as a special expert tribunal to hear and decide such questions, making provisions for a simple, inexpensive and speedy procedure.

The scheme of the Act is very plain as respects, rights and remedies. When a recognized cause of action at law exists an ordinary action at law may be brought for damages. The Act invests the Federal Courts with juridiction to hear and determine such actions. The Act alsospecifies the instances in which *mandamus* may be used; and it also specifies the in-

stances in which injunctions may be sought. It covers the whole circle of remedies civil and criminal. Note, however, that the Act nowhere invests the Courts of equity with any general power or jurisdiction, and note that it confers no general equity jurisdiction on the Circuit Courts of the United States in cases arising under the Act. On the contrary, the enumeration in the Act of the specific instances in which injunctions may be issued excludes the idea of any general jurisdiction in equity.

Why are all these great and extensive powers conferred upon the Commission to investigate by special modes of procedure any and all violations of the Act? Why all these minute details as to the exercise of the power of investigation including for the purpose of taking testimony, the finding of fact, the mode of enforcement, if the Commission may at it pleasure decline to perform these duties, and turn the parties over to an ordinary suit in the Courts? If Congress meant that the courts should have original and independent jurisdiction concurrent with the commission over all violations of the Act why did it not so provide?

The Act had been in force thirteen years when the present suit was brought, and it is admitted that it is the pioneer suit of the kind, thus showing the concensus of opinion that for complaints of the character set forth in the present bill, the parties complaining must submit them in the first instance to the Commission whose decision the act provides may be enforced in the judicial tribunals by injunction. What is gained by going into a Court of equity in the first instance, as the Court will have to appoint a Master, probably a single Master, to make the same investigation which the Act contemplates shall be made by the Interstate

Commerce Commission, whose numbers, duties and experience are supposed to render them peculiarly competent to make it, and to make it speedily. This suit it therefore revolutionary of all previous notions and practice and of all just and sound legal principles, and, is in contravention of the purpose which led to the creation of the Interstate Commerce Commission.

We contend, for the reasons above given, that aside from the Interstate Commerce Act, an independent suit in equity of this nature could not be maintained. The whole power of the Commission and the whole power of the Courts rest after all solely on the constitutional "power of Congress to regulate commerce among the several States." Congress has exercised its power in the Interstate Commerce Act. That Act covers both rights and remedies, and it sets out in its various provisions when the remedy may be by *action at law for damages* (Sections 8, 9 and 10); when by *mandamus* (Section 6, and the Amendatory Act of March 2, 1889); when by *injunction* (Sections 6 and 18); and when by *criminal* proceedings (Section 10). And inasmuch as the Act gives no right to the United States or to others to sue in equity, the act by specifically providing what remedies may be employed, excludes the right (if it would otherwise exist) to bring a suit in equity by original bill.

The foregoing views answer two points made by the other side, namely, Point IV. (page 31), that "*even if the Commission has original jurisdiction over complaints made by individual, the rule does not apply to the Government;*" and Point VIII. (page 45), "*Equity is equal to every emergency.*"

We deny that the Government has any special prerogatives. If the suit is one falling within the Seventh Amendment (which was intended to protect the citizen against the Government), the Government cannot elect to bring a suit legal in its nature in an equity court, and thus deprive the adverse party of the right of a trial by jury. The same is true of the above quoted Act of Congress going back to the Judiciary Act, which prohibits equity from entertaining any suit in any case where there is a plain, adequate and complete remedy at law. On the contrary the established doctrine is that when the Government goes into Court as a suitor, it is bound by the same rules and principles as private parties. So far from equity being an unbounded ocean of jurisdiction, the settled doctrine is that every case in equity must be brought within some "recognized head of equity jurisdiction," and the present bill falls within no recognized head of equity jurisdiction.

It thus appears that there are two insuperable barriers to the maintenance of the present bill:

1st. It is not within the general jurisdiction of a court of equity and no jurisdiction in equity has been conferred by Congress. On the contrary such jurisdiction is negatived by the specific remedies provided by the Act, which remedies exclude the remedy by injunction in this class of cases if it would otherwise exist.

2d. The remedy by mandamus is adequate to redress the particular grievance alleged in the bill; it is the remedy prescribed in the Act in like cases; and therefore under the general doctrine of equity jurisdiction, and under the seventh amendment to the Constitution, and under the Act of

Congress aforesaid (Rev. Stat. Sec. 723, *supra*) this bill in equity cannot be sustained.

These considerations seem to us to be conclusive against the present bill.

We observe that the other side refers to the decision of this Court *in re Debs, 158 U. S.* It is not in point. There the United States mails were actually obstructed, and the specific functions of the general government were interfered with by force and violence, interstate commerce was suspended, great destruction of property was threatened, and a grave crisis resulting in direct and irreparable injury to the United States and its property as well as to public and private property, not capable of awaiting the ordinary process of the law, was impending. That decision stands and is supportable on these special grounds, and can only be justified by them. No such grounds exist in the present case.

V.

THE INTERSTATE COMMERCE ACT AS CONSTRUED BY THE COURTS, HAVING CONFERRED UPON CARRIERS THE SOLE POWER OF MAKING RATES, IN THE ABSENCE OF ANY PROVISIONS BY CONGRESS FIXING INTERSTATE RATES, AND IT HAVING MADE THE DUTY OF THE CARRIERS IN MAKING SUCH RATES TO TAKE INTO CONSIDERATION ALL OF THE CIRCUMSTANCES AND CONDITIONS, SIMILAR AND DISSIMILAR, THE SCHEDULE OR SCHEDULES SO MADE ARE PRESUMPTIVELY LAWFUL, AND

THE NAKED ALLEGATION AND CHARGE IN THE BILL THAT SUCH RATES ARE UNREASONABLE AND DISCRIMINATIVE, OR THAT THERE IS AN UNDUE PREJUDICE UNDER SIMILAR CIRCUMSTANCES AND CONDITIONS, IS NCT SUFFICIENT EITHER TO CONSTITUTE A CAUSE OF ACTION OR TO GIVE THE CIRCUIT COURT JURISDICTION IN EQUITY TO ORIGINALLY HEAR AND DETERMINE THE VALIDITY OF THE RATES THUS FIXED.

In *Texas & Pacific Ry. Co. vs. I. C. C.*, 162 U. S., 197, which arose out of a suit upon complaint by the Commission in the Circuit of the United States for the Southern District of New York against defendant company for certain discriminations charged therein, and in which the company alleged that the bill failed to allege or show any facts constituting a violation by defendant of the order of the Commission, but the Court entered a decree enjoining defendant from further continuing such disobedience of the order, and which was subsequently appealed to the United States Circuit Court of Appeals, Second Circuit, and thence appealed to the Supreme Court of the United States, this Court, after stating that the commission under the act which covered the whole field of interstate commerce, established a tribunal to enforce its provisions of covering the entire service to be performed by carriers, said :

" The very terms of the statute that charges must be reasonable, that discrimination must not be unjust, and that preference or advantage to any particular person, firm, corporation or locality, must not be undue or unreasonable, necessarily imply that strict uniformity is not to be enforced ; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers and consumers, should be con-

sidered by a tribunal appointed to carry into effect and enforce the provisions of the Act."

"The principal purposes of the SECOND SECTION is to prevent unjust discrimination between shippers. It implies that, in deciding whether differences in charges, in different cases were or were not unjust, there must be a consideration of the several questions whether the services rendered were 'like and contemporaneous,' whether the kinds of traffic were 'like,' whether the transportation was effected under 'substantially similar circumstances and conditions. To answer such questions, in any case coming before the Commission, requires an investigation into the facts; and we think that Congress must have intended *that whatever would be regarded by common carriers*, apart from the operation of the statute, as matters which warranted differences in charges, ought to be considered in forming a judgment whether such differences were or were not 'unjust.' Some charges might be unjust to shippers—others might be unjust to the carriers. The rights and interests of both must, under the terms of the Act, be regarded."

"THE THIRD SECTION forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, etc., and as there is nothing in the Act which defines what shall be held to be due or undue, reasonable or unreasonable, such questions are questions, not of law, but of fact. The mere circumstance that there is, in a given case, a preference or an advantage does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the Act. Hence it follows that before the Commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts; and here again we think it evident that those facts and matters which carriers, apart from any question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the Commission in forming its

judgment whether such preference or advantage is undue or unreasonable. . When the section says that no locality shall be subjected to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, it does not mean that the Commission is to regard only the welfare of the locality or community where the traffic originates, or where the goods are shipped on the cars. The welfare of the locality to which the goods are sent is also, under the terms and spirit of the Act, to enter into the question."

It logically follows from this reasoning that *facts* and not conclusions must be pleaded clearly showing not only a right to *a* remedy, but a right to *the* remedy sought here.

So in *I. C. C. vs. Ala. M. R. Co.*, 168 U. S., 144, this Court, after discussing the duties and powers of the Commission in deciding cases regulating and executing the Interstate Commerce Act, and after recognizing the procedure for which we have contended, says (referring to the former decisions of the Supreme Court in the case of:

C. N. O. & T. P. R. Co. vs. I. C. C., 162 U. 184–197, and

T. & P. R. vs. I. C. C., 162 U. S. 197-255),

that:

"The Circuit Court, after a consideration of the evidence expressed its conclusion thus:

"'The act to regulate commerce leaves common carriers as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits. The carriers are better qualified

to adjust such matters than any Court or board of public administration, and, within the limitations suggested, it is safe and wise to leave to their traffic managers the adjusting of dissimilar circumstances and conditions to their business.'"

And further this Court says that:

"The last sentence in this extract is objected to by the commission as declaring that the determination of the extent to which discrimination is justified by circumstances and conditions should be left to the carriers. We understand the statement, read in the connection in which it occurs, to mean only that, when once a substantial dissimilarity of circumstances and conditions has been made to appear, the carriers are, from the nature of the question, better fitted to adjust their rates to suit such dissimilarity of circumstances and conditions than courts or commissions; and when we consider the difficulty, the practical impossibility, of a court or a commission taking into view the various and continually changing facts that bear upon the question, and intelligently regulationg rates and charges accordingly, the observation objected to is manifestly just. But it does not mean that the action of the carriers, in fixing and adjusting the rates, in such instances, is not subject to revision by the commission and the courts."

The Court further says, in answer to the contention on the part of the railroad companies that it has no jurisdiction to review the judgment of the Commission upon these questions that:

"We think this contention is sufficiently answered by simply referring to those portions of the Act which provide that, *when the court is invoked by the Commission to enforce its lawful orders or requirements*, the court shall proceed, as a court of equity, to hear and determine the matter and in such manner as to do justice in the premises."

This decision, or rather these decisions, and a number of other comparatively recent decisions which we might cite, finally crystalize the opinions of the Supreme Court of the United States in the proposition that the carriers are authorized and required by the sixth section of the act, as we shall presently see, to make the schedules and the rates which are final until some rate-making power (and which is the Congress) makes a different rate.

And in making such schedule the carriers are empowered and authorized to take into consideration the various circumstances and conditions surrounding the particular shipment—(1) the necessities of the carrier itself to make a rate in order to get the business; (2) the interest of the shipper; (3) the interests of the person to whom the shipment was made; (4) the interest of the respective municipalities and localities, if municipalities and localities are interested in the shipment; (5) the cost of the relative shipments; (6) competition; (7) volume of business; in fact every conceivable thing which influences a business man or a carrier in determining what the rate should be.

The Court says in the cases cited that the carrier has the right to judge of the "limiting circumstances" and conditions that surround the shipment and that "the carriers are left to manage their own business in their own way, and are better qualified to adjust such matters than any board of public administration;" and that "it is safe and wise to leave to their traffic managers the adjusting of the dissimilar circumstances and conditions."

See, also, *I. C. C. vs. Ala. C. M. R. Co.*, 21 C. C. A., 51; 74 Fed. Rep., 715.

And in the case of *I. C. C. vs. C. N. O. & T. P. R. Co.*, 167 U. S., 480, it is said:

"§ 6 provides that if any common carrier fails or neglects or refuses to file or publish its schedules as provided in the section, it may be subject to a writ of mandamus issued in the name of the people of the United States at the relation of the Commission. * * * Not only is it thus plainly stated that the rates are those which the carrier shall establish, but the prohibitions upon change are limited in the case of an advance by ten days' public notice, and on reduction by three days. Nothing is said about the concurrence or approval of the Commission, but they are to be made at the will of the carrier. Not only are there these provisions in reference to the traffic upon its own line; but further when two carriers shall unite in a joint tariff, (and such union is nowhere made obligatory but is simply permissive), the requirement is only that such joint tariff shall be filed with the Commission and nothing but the kind and extent of publication thereof is left to the discretion of the Commission."

"It will be perceived that the section contemplates a change in rates either by increase or reduction, and provides the conditions therefor. * * * The fact that the carrier is given the power to establish in the first instance, and the right to change, and the conditions of such change specified, is irresistible evidence that this action on the part of the carrier is not subordinate to and dependent upon the judgment of the Commission. * * * We have the clear language of § 6 recognizing the right of the carrier to establish rates, to increase or reduce them and prescribing the conditions upon which such increase or reduction may be made, and requiring, as the only conditions of its action, first, publication, and second, the filing of the tariff with the Commission."

We have quoted at length from the decisions of this Court for the purpose of showing that the carrier has

the power under § 6 to make and publish the rate, and that this power is final until some higher power changes the rate. We have already seen from the other decisions cited above that the Commission has no power to change the rate. It has been repeatedly decided that the Courts have no power to fix a future rate. Any given rate, therefore, fixed by a public carrier on its line or lines is *prima facie* a legal, lawful and just rate. We have seen that before even the Commission can question these rates or present the question as to their reasonableness to the courts, it must, in the mode provided by the Act, find *the substantive facts showing* an unjust charge or discrimination or preference. The presumptions are that the carrier, being empowered to fix rates, has fixed lawful rates, as we have seen; questions of dissimilarity and conditions and preferences and of reasonableness of charge are questions of fact; wherefore, under these authorities *affirmative* proof must be adduced before the proper tribunal to show an unreasonable charge or discrimination or preference, and that too, after the carrier has considered all the rights, interests and conditions of all the various parties, municipalities or places.

Our contention therefore is that a bill such as the present (if otherwise maintainable, which we deny), to be good and sufficient must charge and specify *the facts which show* that the rates in force and published as provided by law, and which cannot be either increased or decreased except upon notice, are unlawful; that the naked averments, as in the bill here, that the charge is unreasonable, the discrimination and undue preference unjust and unreasonable, and that the conditions and circumstances are similar, are not sufficient. *Facts must be stated* to overcome the presump-

tion of their legality, and showing that they are in themselves unlawful.

We have seen that the Courts have uniformly held that there may be excessive charges that are not unreasonable; that there may be discriminations which are not unreasonable or unlawful; that there may be preferences which are not unjust or undue, wherefore it follows that the naked charge of either or all of these wrongs does not charge a cause of action, and it has been repeatedly held, that a comparison of rates between places and points in different States showing a difference does not show or prove anything. And as the interest of the shipper and the interest of the person to whom shipped, and locality which is to get the benefit of the shipment, as well as the carrier, are all to be considered, a bill to be good must make averments *of fact* which negative these conditions which presumptively justify the published rate or schedule.

We have also said under this proposition that the Courts have no original jurisdiction to hear and determine the validity of the schedule or rate in the first instance. According to all of these decisions, an investigation is a necessity, and this is supported with all reason, independent of the decisions. The Courts in these decisions, and in many others, have repeatedly decided that the Commission is the tribunal whose duty it is to ascertain the facts, and having ascertained them, make a report of the facts which show an unreasonable and unjust charge, discrimination and preference; and within these decisions it will be found that the Supreme Court has repeatedly held that findings of conclusions of facts against the carrier are not sufficient, but that the facts showing a just cause of complaint against them must be found and reported in

full. If this be required of the Commission as a mere *prima facie* statement of facts to be used in a case where the Court, according to these findings, may hear and determine the case *de novo*, but with the Commissions' findings as a basis, how much more requisite is it that a bill of complaint, on the part of the United States of America, shall state *facts* showing the offenses charged instead of conclusions of law. The averments of this bill are mere legal conclusions, and there is no more reason why conclusions in a bill of this character should be acceptable to the Court than a naked allegation of negligence in a personal injury case, or of fraud in a case where fraud is charged.

We insist that this Court has no jurisdiction to hear or determine any case except a prima facie case exhibited to it by a report of the Commission stating facts sufficient to constitute a suit, as in § 16 provided.

Moreover, we insist that the Circuit Court has no jurisdiction under the averments of this bill because there are no averments which show that the United States of America have any cause of interference or any rights, property or special interests at stake. The averments here are not averments in behalf of the public. They are averments in behalf a municicipality and its vicinity against a carrier, because of unlawful preferences in favor of *another* municipality. A municipality, a place (which is but another name for municipality), association, firm, corporation, company or person, are the only parties for whom relief is provided under this act.

We are not contending that there are not acts of

Congress under which suits might be brought by the United States of America upon averments showing infringements of the rights, property or interests of the United States, or upon averments bringing the case within some recognized head of equity jurisdiction, but what we claim is that this is not one of that class; that the Interstate Commerce Act has not extended but on the contrary has denied, the right or the remedy by injunction *to the United States for the specific matters charged in this bill.*

We claim further that this act guarantees to every person place or municipality authorized to bring a suit or action of any character an adequate remedy at law and fixes a penalty denounced by the act. The act as a whole is penal and denounces by pains and penalties, and should be construed against complainants by the "rule of strict proof," as laid down in:

Parsons vs. C. & N. W. R. Co., 167 U. S., 447.

In the above case this Court says that the Interstate Commerce act is a penal statute; that persons seeking to recover under such Act should not only be held to the rule of strict *proof* for that reason, but should also be held to the rule of strict averment of *fact;* that is, that there should be a particularity of averment and of the facts constituting the cause of the suit or action.

We further submit that the subject matter of equity jurisdiction being the protection of property and civil rights, courts of equity will not interfere for the prevention of a mere illegal act; and that equity will not restrain an act because it contravenes the general policy in the absence of a violation of a private right.

High on Injunctions (old ed.), §526.

We claim that the Interstate Commerce Act having made a special provision for relief which is just as adequate, and indeed in the very courts in which the Government is proceeding here, and just as speedy, and much more just to all parties, such interference by the Government as is here attempted is not justified. If the Government can intercede in the first instance upon the mere request of the Commission, it can intercede upon the mere request of an individual if he can make a showing of the protean charge of "a public wrong." The Interstate Commerce Commission, not having made any examination or findings, has no more right to make this request under this statute than an individual. It has a right, upon the prescribed conditions and by pursuing the prescribed course, to institute in its own name, Sec. 16 (not in that of the United States) a suit even for the purpose sought here, but it cannot evade the express command of the law that it shall first investigate, give "due notice" and "hearing" and "the opportunity to desist" (Sec. 15). The wisdom of the adoption of this course in every case, so far as we have been able to ascertain, has been demonstrated by observation and experience. The reports of the Commission show multitudes of cases thereby adjusted before they ever came to a suit. This observation is equally as applicable to municipalities, and places and localities as to persons (Sec. 13); and equally as practicable for them; indeed, there is every reason that the statutory course should be pursued instead of the novel procedure in this case. Unless this statutory course is thus pursued, the flood-gates of litigation in the Federal Courts will be thrown wide open, the Interstate Commerce Commission will shift

upon the Courts its responsibilities and its labors. It is not only a question of power and right upon the part of the Government, but a question of propriety and justice.

We submit that the demurrer to the bill ought to have been sustained. The decree should be reversed and cause remanded with directions to dismiss the bill *(see Stipulation, Record,* pp. 53, 54*)*.

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APPENDIX.

Opinion of Hook, J., Holding That an Original Bill in Equity Will Not Lie in the First Instance Where the Commission Has Not Acted, to Relieve Against Alleged Discriminatory Railroad Rates.

This opinion was delivered January 7, 1902, and is printed here for the convenience of the Court.

IN THE CIRCUIT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF KANSAS.

VANDERSLICE-LYNDS MERCANTILE COMPANY ET AL.,
Complainants,

vs.

MISSOURI PACIFIC RAILWAY COMPANY,
Defendant.

Opinion.

HOOK, J.: Three matters of importance requiring consideration are raised by defendants' plea to the jurisdiction and its demurrer to a portion of the bill.

[After disposing of the questions of jurisdiction and that no federal question appeared from the averments to the bill, which questions are not here material, the learned Judge proceeded as follows :]

" THIRD. The most serious contention is that raised by the demurrer, and it is whether or not a bill in equity will lie under the Interstate Commerce act to redress the grievances set forth in the bill of complaint without first submitting them to the Interstate Commerce Commission.

" It is contended by the defendant that the complaint should have been first submitted to the Commission and that a Federal court will not entertain a suit in equity in the first instance where the principal object sought is a correction of alleged discriminative rates. On behalf of the complainant it is contended, in order to sustain the jurisdiction of the court on the ground that a Federal question is involved, that the suit arises under the Interstate Commerce act, and in order to avoid the force of defendant's demurrer it is contended that the suit is maintainable in equity under general principles of law irrespective of the provisions of the Interstate Commerce act. That the contentions of complainants' counsel may be somewhat inconsistent is immaterial so far as concerns the question of jurisdiction for the reason that as already indicated jurisdiction is sustainable upon the ground of diverse citizenship.

" It is apparent however, from the face of the bill, that the complainants are seeking to enforce the provisions of the Interstate Commerce act. As complainants' counsel says in his brief " The Interstate Commerce act is made the basis of a charge in the bill against discrimination." SEC. 8 of the original act (24 Stat. 379) provides that any common carrier subject to the provisions of the act shall be liable to the person injured by a violation thereof for the full amount of damages sustained. SEC. 9 provides that any person damaged may either make complaint to the Interstate

Commerce Commission as provided for in the act or may bring suit for the recovery of damages in any district or circuit court of the United States of competent jurisdiction, but that he shall not have the right to pursue both of said remedies, and must in any case elect which one of the two methods of procedure he will adopt. SEC. 10 denounces a violation of the act of anyone subject to the provisions thereof as a misdemeanor and provides that the district courts of the United States shall have jurisdiction of such offenses. SEC. 10 creates the Interstate Commerce Commission and other sections define the powers and duties of the Commission. SEC. 14 provides that in every investigation made by the Commission a report in writing shall be made which shall include the findings of fact upon which the conclusions of the Commission are based, with its recommendations in respect thereof, and that "such findings so made shall thereafter in all judicial proceedings be deemed *prima facie* evidence as to each and every fact found."

SEC. 16 provides that whenever any common carrier subject to the provisions of the act shall violate or refuse or neglect to obey any lawful order or requirement of the Commission it shall be the duty of the Commission and also lawful for any company or person interested in the order or requirement, to apply in a summary way by petition to the Circuit Court of the United States sitting in equity in the proper judicial district. Power is given to the Circuit Court to thereupon hear and determine the matter as a court of equity and to do justice in the premises. Upon such hearing the report of the Commission is to be taken as *prima facie* evidence of the matters therein stated. The court has power in such proceeding to issue writs of injunction or other process enforcing obedience to lawful orders of the Commission. An appeal is provided from the decree of the Circuit Court direct to the Supreme court of the United States, but by subsequent legislation the appeal is now to the Circuit

Courts of Appeals in the first instance. SEC. 10 of the amendatory act of 1889 (25 Stat. 863) provides that the Circuit and District Courts of the United States shall have jurisdiction to issue writs of mandamus on the relation of any person to enforce the right of the relator to have interstate traffic moved by the common carrier at the same rates as are charged or upon terms or conditions as favorable as those given by the carrier to other shippers for like traffic under similar conditions. It is also provided that the writ of mandamus shall be cumulative and it will not be held to exclude or interfere with other remedies provided by the Interstate Commerce act.

SEC. 22 of the original act provides that nothing therein contained shall in any way abridge or alter the remedies existing at common law or by statute, but the provisions of the act are in addition to such remedies.

I am unable to discover that the Supreme Court of the United State has passed upon the question which is raised by the demurrer in this case. It has been the uniform practice for persons or corporations complaining of the violation by common carriers of the provisions of the Interstate Commerce act to first apply to he Commission for an order redressing the grievances complained of. After such orders have been made it has generally happened that the Commission itself instituted the proceedings in the Circuit Court for the enforcement thereof, although in some instances proceedings were instituted by the parties claiming to be injured and more directly in interest. In both classes of cases, however, the orders of the Commission were set forth and relied upon as *prima facie* evidence.

Now the complainants contend in the case in hand that they may ignore the Commission altogether and may bring a suit in equity in the Circuit Court and obtain full relief against discriminative rates, and require the Court to make an exhaustive and com-

prehensive inquiry into the whole subject of rates, the effect of competition of lines of transportation between Kansas City and St. Louis, similar and dissimilar conditions, and, in fact, do everything which the Interstate Commerce Commission was expressly created to do in the first instance as an aid and assistance to Courts in subsequent litigation. Some of the decisions of the Supreme Court of the United States throw light upon this question and indicate how the Commission is to be regarded in its relation to the Courts in matters in litigation similar to those involved in this suit. It should be first observed that when complaint is made to the Commission and it has investigated and made its report, and thereafter suit is instituted in the Circuit Court, that Court is not confined to the testimony elicited before the Commission but may try the matters in issue *de novo*. It is therefore inferable that if the Circuit Court has jurisdiction of a suit in equity such as the one in hand without regard to the Interstate Commerce Commission or the preferment of a complaint before it, the Circuit Court in a suit brought after the Commission has acted should, the bill of complaint being broad enough, proceed to final decree, although its conclusions might differ in substantial particulars from the findings of the Commission. In other words if the contention of complainant's counsel is correct, the findings of the Commissioners being merely *prima facie* evidence, the Circuit Court having secured jurisdiction of the particular cause and possessing, as complainants' counsel contends plenary jurisdiction as a court of equity under general principles of law irrespective of the provisions of the Interstate Commerce Act, should proceed to the ultimate determination of the rights of the parties without remanding or re-referring the case to the Interstate Commerce Commission. This, however, is not done.

Railway Company vs. Commission, 162 U. S., 196.

In this case the Supreme court in expressing disapproval of the method of railroad companies in withholding the larger part of their evidence from the Commission and first presenting it in the Circuit Court, said:

"The Commission is an administrative board and the courts are only resorted to when the Commission prefers to enforce the provisions of the statute by a direct proceeding in the court or when the orders of the Commission have been disregarded."

In this case the Circuit Court of Appeals examined the evidence adduced before the Commission and the evidence adduced before the Circuit Court and proceeded to an original investigation of the testimony and determined the facts established thereby. The Supreme Court said that the Circuit Court of Appeals should have reversed the decree of the Circuit Court, set aside the order and remanded the cause to the Commission, in order that it might if it saw fit, proceed therein according to law. It was also said that " the defendant was entitled to have its defense considered in the first instance at least by the Commission upon a full consideration of all the circumstances and conditions upon which a legitimate order can be founded * * * and it did not comport with the true scheme of the statute that the Circuit Court of Appeals should undertake of its own motion to find pass upon such questions of fact in a case in the position in which the present one was."

L. & N. Railroad Co. v. Behlmer, 175 U. S., 648:

In this case Behlmer, who was a wholesale dealer in hay and grain, began proceedings before the Interstate Commerce Commission complaining of discriminative rates. Testimony having been taken and a hearing had, the Commission made an order requiring the Railroad Company to desist from making certain charges. The order not having been obeyed, Behlmer filed his complaint in the Circuit Court of the United

States for the Eastern District of South Carolina. By stipulation the testimony taken before the Commission was used at the hearing in the Circuit Court and in addition thereto certain documentary evidence was received. The Circuit Court entered a decree that Behlmer's bill be dismissed. From this decree an appeal was taken to the Circuit Court of Appeals for the fourth circuit and that court reversed the decree of the Circuit Court and remanded the cause with instructions to render a decree substantially in accordance with the order made by the Commission. The cause was then taken to the Supreme court of the United States. The Supreme Court reversed the decree of the Circuit Court of Appeals and ordered that the case be remanded to the Circuit Court with instructions to modify its decree by providing that the dismissal be without prejudice to the right of the Commission to proceed, upon the evidence already introduced before it or upon such evidence and any additional evidence which it might allow to be introduced, to hear and determine the matter in conformity to law. In other words, the cause was not remanded to the Circuit Court with instructions to hear and determine the cause as a court of equity having plenary jurisdiction of the matters in controversy.

The same rule was adhered to in *Interstate Commerce Commission v. Steamship Company*, 181 U. S. 29. In this case the Supreme Court declined to enter into an original investigation of the evidence adduced but held that it was the duty of the court to correct the error of law committed by the commission and having done so it modified the decree of the Circuit Court of Appeals and of the Circuit Court by providing that the dismissal, of the bills should be without prejudice to the right of the Commission to make an additional investigation of the questions contained in the record pertinent to the complainants presented to that body.

Railway Company vs. Commission, 181 U. S. I.

In this case the decree of the Circuit Court of Appeals of the sixth circuit was reversed and the case was remanded to the Circuit Court with instructions to set aside its decree adjudging that the order of the Commission be enforced and to dismiss the application of the Commission without prejudice to its right to proceed, upon the evidence already introduced or upon such further pleadings and evidence as it might allow to be made or introduced, to hear and determine the matter in controversy according to law. The Supreme court declined to go into the whole evidence in order to determine the questions presented, nor did it in remanding the cause authorize the Circuit Court to do so. The Supreme Court said that the Commission "from the nature of its organization and the duties imposed upon it by statute is peculiarly competent to pass upon questions of fact of the character here arising."

Southern Pacific Co. v. Colorado Fuel & Iron Co. 101 Fed. 783.

The opinion of the Circuit Court of Appeals was delivered by Judge THAYER. The injunction of the lower court based upon the action of the Interstate Commerce Commission contained three clauses. The first and third clauses were held to be beyond the power of the Commission and of the Circuit Court for the reason that an attempt was made to prescribe a schedule of maximum rates, the Supreme court of the United States having determined that the Interstate Commerce Commission had no such power. By the second clause of the order of the Circuit Court the defendants were restrained in general terms from demanding 'unreasonable rates and from giving undue and unreasonable preferences to persons or localities or from subjecting the complainant to an unreasonable disadvantage etc. Judge THAYER said that this clause might possibly be upheld but that it was not apparent that any special advantage would result to the complainant from an order

couched in such general terms but which merely repeats the general admonitions of the Interstate Commerce Act. It is noteworthy that instead of so remanding the cause that the indefinite character of the second clause might be corrected by the Circuit Court the case was remanded with directions to dismiss the bill of complaint. Judge THAYER also said *that no reason was perceived why the remedy at law for the threatened wrong should be pronounced ineffectual or inadequate.*

He said:

"The damages that the complainant will sustain if it is right in its contention as to the unreasonableness of the proposed rates can be ascertained by a court and jury, while it is not suggested that the defendant Company is insolvent, or that it will be unable to respond for such damages as a jury may assess. Besides, a single verdict before a jury establishing the unreasonableness or discriminating character of the proposed rate would probably lead to a withdrawal of the rate, and avoid the necessity for further actions."

Doubtless there are cases which fall within the provisions of the Interstate Commerce act but of which the jurisdiction of the Circuit Courts as courts of equity is not referable alone to the terms of the act, but arises independently of the act from general principles of equity jurisprudence.

In my opinion the case at bar as shown by the averments of the bill and the nature and scope of the remedy is not of that class.

The bill will therefore be dismissed without prejudice to actions at law or proceedings before the Interstate Commerce Commission as complainants may elect.

WILLIAM C. HOOK,
Judge."

January 7, 1902.

UNITED STATES OF AMERICA, }
District of Kansas, } ss. :

I, GEO. F. SHARITT, Clerk of the Circuit Court of the United States of America, for the District of Kansas, do hereby certify the foregoing to be a true, full and correct copy of the Opinion in the suit of Vanderslice-Lynds Mercantile Co. *et al.*, vs. Missouri Pacific Railway Co. Case No. 7809 in said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said
[SEAL.] Court at my office in Topeka, in said District of Kansas, this 8th day of August, A. D. 1902.

GEO. H. SHARITT,
Clerk.